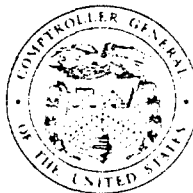


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186496

DATE: SEP 3 1976

98080

MATTER OF: Carolyn K. Kunselman - Claim for
retroactive compensation

DIGEST:

Employee who resigned position with General Services Administration as GS-5, step 5 was reemployed 18 months later with Air Force at GS-3, step 4. Although she could have been placed at step 10 under highest previous rate rule, she is not entitled to retroactive compensation. Establishing pay rate at highest previous rate was within discretion of administrative agency, and record does not establish that administrative error was made in setting pay rate.

This action is a reconsideration of the denial on December 23, 1975, by our Claims Division of the claim of Ms. Carolyn K. Kunselman for retroactive compensation believed due because of the failure of the Department of the Air Force to reemploy her at the highest step in grade under the provisions of the highest previous rate rule. The claim was disallowed on the ground that under agency regulations it was within the discretion of the agency to establish the claimant's pay rate at any rate not in excess of her highest rate previously held.

The record indicates that Ms. Kunselman resigned from a position with the General Services Administration on March 15, 1968, as a GS-5, step 5. Effective November 6, 1968, she was reemployed by the Air Force Contract Management District (AFCMD) as a Clerk-Typist, GS-3, step 4, and was stationed at the Martin Marietta Corporation facility. Ms. Kunselman believes that under the highest previous rate rule her pay rate should have been set at GS-3, step 10. On appeal, Ms. Kunselman argues that her pay rate was not appropriate to her job-related experience and that her supervisor's decision was based upon a "value judgment" to set her rate not in excess of another employee in a comparable position. She states further that if such pay rate cannot be changed, retroactive compensation should be afforded from the time of her subsequent employment at the Air Force Finance Center since it was the policy of that activity to pay the highest salary possible to reemployed personnel and since other employees received such consideration. The record indicates that Ms. Kunselman was reassigned at her request to the Air Force Finance Center effective April 2, 1972, and that she left a position as a Secretary, GS-4, step 4, to accept a position as a Reserve Pay and Travel Clerk, GS-4, step 4.

As noted in our Claims Division settlement, under the provisions of section 5334 of title 5, United States Code, the Civil Service Commission has promulgated regulations contained in section 531.203(c) of title 5, Code of Federal Regulations, which provide that when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate. Thus, it is within the discretion of the employing agency to allow an employee his highest previous rate. The administrative report states that Department of the Air Force regulations applicable at the time of Ms. Kunselman's reemployment, AFMND Supplement No. 1 to Air Force Regulation (AFR) 40-521, provided that reinstated employees shall have their pay rates established at the basic rate (step 1) of the grade to which the employee was appointed, unless a higher rate was requested and justified by the appropriate supervisor and approved prior to appointment. While Ms. Kunselman did not receive the highest pay rate (GS-3, step 10) that she could have received on the basis of her former Government pay rate she was placed in step 4 rather than the basic rate (step 1), and the administrative report states that this rate was determined appropriate to her job-related experience.

We have long held that an employee has no vested right upon reemployment to receive the highest salary rate previously paid, and, absent a showing of administrative error at the time the pay rate was fixed, there is no authority to change the pay rate either retroactively or prospectively. D-173815, April 13, 1973; 39 Comp. Gen. 550 (1960); 34 id. 380 (1955); and 31 id. 15 (1951). We have also held that where agency action is committed to agency discretion, the standard to be applied by the reviewing authority is whether the action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 54 Comp. Gen. 310, 312 (1974). Based upon the record before us, we find nothing which would establish that an administrative error was made in setting Ms. Kunselman's pay rate upon reemployment.

With regard to Ms. Kunselman's request for retroactive compensation from the time of her transfer to the Air Force Finance Center, we note that under the applicable agency regulations, AFR 40-530, the agency retained the discretion to set the pay rate of any employee who was transferred at any step which did not exceed his highest previous rate. We are unaware of any local policy applicable to the period of time in question which would mandate that the claimant receive a pay rate based on her highest previous rate. While Ms. Kunselman lists the names of other employees who have benefited under the highest previous rate

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rule, the record does not establish that the actions taken in either the claimant's case or the other employees' cases were not in accordance with existing policy and administrative regulations.

Accordingly, we must sustain the action of our Claims Division in disallowing Ms. Kunselman's claim for retroactive compensation.

The claimant has requested information regarding what other courses of action are available to her. She is advised that decisions of the Comptroller General of the United States rendered on claims settled by the General Accounting Office are conclusive upon the executive branch of the Government. See 31 U.S.C. 74 (1970). Independent of the jurisdiction of the General Accounting Office, the United States Court of Claims and the United States District Courts have jurisdiction to consider certain claims against the United States if suit is filed within six years after the claim first accrued. See 28 U.S.C. 1346(a)(2), 1491, 2401, and 2501.

R.F.KELLER

Acting

Comptroller General
of the United States